

**STATE OF NEW MEXICO
TAXATION AND REVENUE DEPARTMENT
IMPLIED CONSENT ACT**

**IN THE MATTER OF THE PROPOSED REVOCATION
OF THE NEW MEXICO DRIVING PRIVILEGES OF GEORGE SIKKINK
NOTICE OF REVOCATION NO. 20213575**

DECISION AND ORDER

On June 13, 2011, at 1:00 p.m., an in-person hearing occurred before Jane Kircher, Hearing Officer, in Albuquerque, Bernalillo County, New Mexico. Mr. George Sikkink appeared at the hearing with counsel Liane Kerr. Sergeant Armijo (#492) of the Albuquerque Police Department appeared as a witness on behalf of the State and testified. The Notice of Revocation (Exhibit MVD #1), the breath test print-out (Exhibit MVD #2) and the notes of Mr. George Sikkink made while looking in a phone book to arrange for additional independent test (Exhibit Motorist #A) were admitted into the record. The hearing was conducted pursuant to the New Mexico Implied Consent Act and the regulations set forth in Section 18.19.9 NMAC (4/01/2007). The issues for the Hearing Officer's consideration are articulated under NMSA 1978, Section 66-8-112(E) (2003) of the Implied Consent Act. All objections and motions not otherwise addressed at the hearing or addressed herein are overruled and denied.

FINDINGS BY THE PREPONDERANCE

- 1) Sergeant Armijo had reasonable grounds to believe Mr. George R. Sikkink was driving a motor vehicle under the influence of intoxicating liquor and/or drugs.
- 2) Sergeant Armijo arrested Mr. Sikkink.
- 3) The hearing was held within 90 days of the Notice of Revocation.
- 4) A chemical test was properly administered to Mr. Sikkink pursuant to the provisions of the Implied Consent Act.
- 5) Mr. Sikkink is twenty-one (21) years of age or more.
- 6) The test results indicated that Mr. Sikkink had an alcohol concentration of .18 and .18.
- 7) Mr. Sikkink has not previously had his license revoked pursuant to the provisions of the Implied Consent Act.

DISCUSSION AND ANALYSIS

The preponderance of the evidence presented at the hearing established the following:

On March 20, 2011, in the City of Albuquerque, Bernalillo County, New Mexico, Sergeant Armijo was westbound on Interstate 40 and the vehicle being driven by Mr. George Sikkink was proceeding in front of the sergeant's vehicle. Mr. Sikkink was traveling in the right westbound lane, and one-half of his vehicle traveled into the off ramp for traffic exiting at Juan Tabo. Mr. Sikkink's vehicle straddled the lane line for the distance of one to two blocks. Sergeant Armijo engaged his emergency equipment and stopped Mr. Sikkink.

The sergeant walked up to Mr. Sikkink seated in the driver's seat. The sergeant observed that Mr. Sikkink had a strong odor of alcohol coming from his person which the sergeant smelled over a minty smell, and the sergeant observed that Mr. Sikkink had bloodshot watery eyes and slurred speech. The sergeant had Mr. Sikkink exit his vehicle, and Mr. Sikkink used his right hand on the door and his left hand on the seat to exit his vehicle. The sergeant told Mr. Sikkink what he had observed about Mr. Sikkink's odor of alcohol and eyes and driving. Mr. Sikkink at that time denied that he had been drinking alcohol, but he later admitted to the sergeant that he had been drinking. Sergeant Armijo observed that Mr. Sikkink was chewing gum and had Mr. Sikkink spit it out at that time.

Sergeant Armijo administered field sobriety tests to Mr. Sikkink. On the horizontal gaze nystagmus test, Mr. Sikkink exhibited a clear lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and sustained nystagmus at 45 degrees in both eyes. On the nystagmus test, Mr. Sikkink swayed from side to side by several inches which was prominent and obvious. On the walk-and-turn test, Mr. Sikkink stepped offline several times during the instructional stance, held his hands up to a point about 4 to 5 inches before his shoulders, used both feet to make his turn, took several side steps offline up and back, and completely lost balance on the turn. On the one leg stand test, Mr. Sikkink hopped, raised his arms up about 24 inches, clearly swayed and dropped his foot. Sergeant Armijo concluded that Mr. Sikkink was driving while under the influence of intoxicating liquor or drugs, and the sergeant arrested Mr. Sikkink for DWI.

Counsel's motion to dismiss the revocation, on the grounds that the charging document did not charge Mr. Sikkink with DWI, is denied. The Implied Consent Act does not require that the driver be charged with DWI. The Implied Consent Act requires only that the person was arrested for an offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug. NMSA 1978, Section 66-8-107. The evidence established that at the time of the incident Mr. Sikkink was arrested by Sergeant Armijo for DWI.

The Hearing Officer was persuaded that the evidence established by a preponderance that Sergeant Armijo had reasonable grounds to believe that Mr. Sikkink had been driving while under the influence of intoxicating liquor or drugs. In State v. Scussel, 117 N.M. 241, 243, 871 P.2d 5, 7 (Ct. App. 1994), the court defined "under the influence" to mean that "to the slightest degree" the driver is less able "to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public." While there were some clues on the standardized field sobriety tests which were not displayed by Mr. Sikkink, Mr. Sikkink did exhibit six clues on the nystagmus test; he exhibited poor balance as he swayed on the nystagmus test, he stepped offline multiple times and raised his arms almost shoulder high on the walk-and-turn test, and he hopped, swayed, dropped his foot and raised his arms on the one leg stand test; and he did not perform the turn on the walk-and-turn test as he was instructed. As Mr. Sikkink also exhibited signs of intoxication (odor of alcohol, bloodshot watery eyes and slurred speech) along with Mr. Sikkink displaying nystagmus and standardized clues on the field sobriety tests, the evidence established that there were ample reasonable grounds upon which to conclude that Mr. Sikkink was driving while under the influence of intoxicating liquor or drugs. The Hearing Officer was not persuaded by counsel's argument that the results of Mr. Sikkink's performance on the field sobriety test did not reliably establish that Mr. Sikkink was under the influence of intoxicating liquor or drugs or that Mr. Sikkink was impaired by alcohol because there were some standardized clues on those standardized tests which Mr. Sikkink did not exhibit. Mr. Sikkink exhibited various and multiple signs that he was under the influence of intoxicating liquor or drugs or that he was impaired by alcohol.

The Hearing Officer was not persuaded that Mr. Sikkink's performance on the field sobriety tests was attributable to Mr. Sikkink having a learning disability, which requires a repetition of instructions in order for Mr. Sikkink to understand them. Mr. Sikkink did not tell the officer that he had a learning disability which affected his understanding of instructions. Moreover, Sergeant Armijo gave verbal instructions for the walk-and-turn test and the one leg stand test, but the sergeant also gave a physical demonstration of each of those tests to Mr. Sikkink. Additionally, after the sergeant gave the instructions to Mr. Sikkink on each of those tests, the sergeant asked him if he understood, and Mr. Sikkink told the sergeant that he did. The sergeant also asked Mr. Sikkink if he had any questions, and Mr. Sikkink indicated to the sergeant that he did not have any questions.

The Hearing Officer also was not persuaded by counsel's argument that Mr. Sikkink's having written the names and phone numbers of companies for a blood test indicated that he was not under the influence.

Sergeant Armijo transported Mr. Sikkink to the Prisoner Transport Center. Sergeant Armijo visually checked Mr. Sikkink's mouth and conducted a deprivation period during which the sergeant was with Mr. Sikkink and the sergeant observed that Mr. Sikkink did not eat, drink or smoke. The sergeant read to Mr. Sikkink the Implied Consent advisory and informed him of his right to arrange for an additional test the cost of which would be paid for by the police department. Mr. Sikkink agreed to submit to a breath test.

The sergeant administered a breath test to Mr. Sikkink on an Intoxilyzer 8000, for which the sergeant was a certified operator. The sergeant observed that the instrument had a certification sticker on it indicating that the instrument was validly certified. The sergeant put a clean mouthpiece on the breath tube for Mr. Sikkink's breath test. After the sergeant entered the appropriate information, he cycled the instrument and Mr. Sikkink submitted two breath samples into the instrument. The instrument ran a diagnostic test which passed, the temperature of the simulator was 34 degrees, the instrument ran a calibration check the result of which was within appropriate limits, and air blanks were run during Mr. Sikkink's test all results of which were appropriately .00. The sergeant had administered breath tests on that type of testing instrument, and he observed that the testing instrument functioned normally during Mr. Sikkink's breath test. The instrument employed a unit of measurement which was grams of alcohol per 210 liters of breath. Two breath samples were submitted by Mr. Sikkink and analyzed.

After the breath test, Mr. Sikkink asked for a blood test. The sergeant gave Mr. Sikkink the yellow pages. Mr. Sikkink asked the sergeant for a number to call for a blood test, and the sergeant explained to him that he cannot assist him. Mr. Sikkink got frustrated because he wanted the sergeant to arrange for a blood test for him, but the sergeant told Mr. Sikkink that he cannot do that but the sergeant can give him the tools to make the arrangements. The sergeant gave Mr. Sikkink paper and a pencil along with a phone, and Mr. Sikkink located and called various numbers from 9:30 to 10:22 p.m. At that time, Mr. Sikkink told the sergeant, "No one is going to come out. That's it."

The sergeant testified that he has had drivers who have been able to make arrangements for a blood test. The sergeant further explained that he does not tell people which lab to call to make arrangements for an additional test, but the person has to make his own arrangements. Counsel's argument, that the sergeant treated drivers disparately because the sergeant did not tell Mr. Sikkink which lab to call, was not persuasive. The evidence in fact indicated that the sergeant treats all drivers the same, in that the sergeant does not tell anyone who to call. If the

driver is able to make arrangements for blood to be drawn by calling a lab which actually performs such a service, the driver then obtains a blood test by virtue of making those arrangements himself. An officer at a minimum is required to provide a driver with access to a phone book in order to provide the reasonable opportunity to make arrangements for an independent test. See State v. Jones, 125 N.M. 556, 964 P.2d 117, 1998-NMCA-076. The New Mexico Court of Appeals held in Jones, supra, that NMSA 1978, Section 66-8-109(B), which contains the requirement that the person tested be informed of his right to a reasonable opportunity to arrange for an additional test, "does not guarantee the arrestee an additional test will be performed, but only that the arrestee will be given a reasonable opportunity to arrange for an additional test. Our statute does not guarantee that the test will actually be performed by the person contacted."

The Hearing Officer was persuaded that the breath test was administered to Mr. Sikkink pursuant to the Implied Consent Act after he had been arrested and that the results of Mr. Sikkink's breath test are reliable.

ORDER SUSTAINING THE REVOCATION

FOR THE REASONS STATED ABOVE, IT IS HEREBY ORDERED that the revocation of the New Mexico driver's license, permit or privilege to drive of the person named above is **SUSTAINED for six (6) months** or later until all conditions for reinstatement are met. The revocation shall begin on _____.

IF THE DRIVER WISHES TO DRIVE ANY vehicle after the effective date of this Notice of Result, the driver must obtain an ignition interlock license and have an ignition interlock device installed in ANY vehicle the driver drives. In order for the driver to reinstate the driver's license, the driver must be able to demonstrate a minimum six-month period of driving with an ignition interlock license without any attempts to circumvent or tamper with the interlock device. The driver will also be required to pay a \$100 reinstatement fee, take and pass all required tests, and pay the licensing fee. If the driver has any questions, the driver should contact MVD at one of the following telephone numbers: 505-476-3229, 505-476-3608, 505-476-3173 or 505-476-3446.

THE DRIVER AND/OR THE DEPARTMENT IS ADVISED that pursuant to NMSA 1978, Section 66-8-112(H) (2003) any person adversely affected by an order of the division may appeal and seek review within thirty (30) days in the district court in the county where the offense for which he/she was arrested took place.

DATED: July 27, 2011

Jane Kircher
Hearing Officer
Taxation & Revenue Department